INTERIOR BOARD OF INDIAN APPEALS

Robert L. Thweatt v. Acting Western Regional Director, Bureau of Indian Affairs

37 IBIA 19 (10/23/2001)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ROBERT L. THWEATT, Appellant	:	Order Vacating Decisions and Remanding Case
v.	:	
	:	Docket No. IBIA 01-57-A
ACTING WESTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	October 23, 2001

This is an appeal from a December 15, 2000, decision of the Acting Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning the October 20, 2000, cancellation of Colorado River Permit WB-155-C by the Superintendent, Colorado River Agency, BIA. For the reasons discussed below, the Board vacates both the Regional Director's December 15, 2000, decision and the Superintendent's October 20, 2000, decision and remands this matter to the Superintendent.

On February 11, 1974, the Colorado River Indian Tribes (Tribe) issued Permit WB-155-C to Joe and Christine Rosenbaum. The permit was approved by the Superintendent on February 14, 1974. It covers land within sec. 11, T. 4 S., R. 23 E., San Bernardino Base and Meridian, Riverside County, California, and authorizes use of the land for residential and commercial purposes. On September 25, 1981, the Rosenbaums assigned the permit to Eugene and Joylene Thweatt. The assignment was approved by the Superintendent on September 28, 1981. The business presently conducted under the permit is known as the "Twin Palms Resort" and/or the "Twin Palms Trailer Park."

Appellant Robert L. Thweatt states that he is the son of Eugene Thweatt, who died in 1991. He further states that he took over the day-to-day management of the Twin Palms Resort following the death of his father and that he became the business partner of his stepmother, Joylene Thweatt, in 1992.

On June 27, 2000, the Tribe wrote to Appellant stating that he was in violation of paragraphs 8 and 15 of the permit because no assignment of the permit to Appellant had been

approved by the Tribe and because Appellant was selling gasoline without permission from the Tribe. 1/

Citing paragraph 5 of the permit, 2/ the Tribe continued:

> The [Tribe] is hereby providing ninety (90) days written notice that Permit No. WB-155(C) will hereby terminate on September 30, 2000.
>
> The area will be appraised and negotiations will begin when all violation[s] are brought into compliance.
>
> In accordance with Title 25, Chapter I, Code of Federal Regulations, Part 162.14, you are hereby notified that you have Fifteen (15) days from your acknowledged receipt of this notice or until the close of business on July 17, 2000 to Show Cause why Permit No. WB-155(C) should not be canceled for failure to comply with the above cited permit requirements.

Tribe's June 27, 2000, Letter at 2-3.

On October 5, 2000, the Tribe again wrote to Appellant, stating that he was in violation of provisions of the permit concerning (1) performance bonds, (2) public liability insurance, (3) fire and damage insurance, and (4) sublease, transfer, and assignment. As to item (4), the Tribe's letter requested that Appellant submit a current listing of all tenants/ sublessees, with current addresses, no later than October 20, 2000. However, the letter said nothing about the possibility of termination or cancellation of the permit.

Appellant's attorney wrote to the Tribe on October 13, 2000, in response to the Tribe's June 27 and October 5, 2000, letters. He stated that gasoline sales had been discontinued

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1/ The documents in the record variously refer to the sections of the permit as "paragraphs" and "Articles." The Board uses the term "paragraph," which is the term used in the permit itself.

2/ Paragraph 5 provides:

"This application [for a permit] is made for an initial term commencing on February 1, 1974 and ending on December 31, 1974, and continuing thereafter for successive periods of one year each; provided, however, that the permit herein applied for may be terminated on December 31st of any year during its term or any extension thereof by written notice served by the applicant upon the United States at least sixty (60) days in advance thereof, and provided further that said permit may be terminated at the end of the initial term or at the end of any such successive one-year period by written notice served by the United States or the Tribes upon the applicant at least ninety (90) days in advance thereof."

some time ago. He also stated that the provisions referred to in the Tribe's October 5, 2000, letter did not appear in the copy of the 1974 permit in the Thweatts' possession.

On October 20, 2000, the Superintendent wrote to Appellant, cancelling Permit WB-155-C. He stated that he was doing so under paragraph 16(b) of the permit, 3/ as well as under paragraph 5 of the permit and 25 C.F.R. § 162.14 (2000). He further stated that Appellant had the right to appeal the cancellation to the Regional Director.

On November 2, 2000, the Tribe wrote to Appellant, stating: "You are hereby notified * * * that [Permit WB-155-C] is declared forfeited and is terminated effective December 4, 2000, for the following [sic]: The occupant of this permit has failed to provide proof that the landowner approved the transfer from Eugene and Joylene Thweatt to [Appellant]."

On November 20, 2000, the Tribe wrote to the residents of the Twin Palms Trailer Park, advising them that the Tribe would take over management of the park on December 5, 2000.

Appellant appealed the Superintendent's October 20, 2000, decision to the Regional Director. On December 15, 2000, the Regional Director issued the decision on appeal here. He stated in part:

> Significantly, in its June 27, 2000, letter, [the Tribe] cited Paragraph 5 of the Permit, which provides, in part, as follows:
>
> > ... said permit may be terminated at the end of the initial [one-year] term or at the end of any such successive one-year period by written notice served by the United States or the Tribes upon the applicant at least ninety (90) days in advance thereof.

3/ Paragraph 16 provides:

"The within permit shall terminate and all rights of the applicant hereunder shall cease:

"(a) Upon the termination of the term or extended term hereof in the manner specified in paragraph 5 hereof.

"(b) After failure of the applicant to perform or comply with any of the provisions of this application and permit, and on the 30th day following the giving of written notice to applicant of termination because of failure to perform such provisions; provided that, except as to a breach of any of the provisions of paragraph 12 [concerning water], this subparagraph (b) shall not apply to the first failure of an applicant to perform or comply in any one calendar year until such applicant has been given written demand by the Tribes specifying the performance or compliance required and applicant has failed for 15 days following the giving of such written demand to so perform or comply."

> In citing Article 5 of the Permit, [the Tribe] advised [Appellant] that his Permit would terminate on September 30, 2000, based on the estimated date on which a 90-day notice period [would] elapse. [The Tribe] failed to note, however, that under Article 5 of the Permit a cancellation so made at its option could only be made effective at the end of the calendar year (and then only so long as the notice preceded the end of the calendar year by more than 90 days).
>
> In reviewing the Permit, we find that the "termination" provisions in Article 16 cross-reference Article 5, and characterize a tribal option to cancel such as that exercised by [the Tribe] on June 27, 2000, as an alternative to a cancellation for cause such as that attempted by the Agency on October 20, 2000. We also find that the Interior Board of Indian Appeals * * * has held that negotiated provisions which give an Indian landowner a unilateral option to cancel may be exercised so as to effectively terminate a lease or permit without BIA action. See Scherler v. Anadarko Area Director, 33 IBIA 276 (1999). It being undisputed that both Robert and Joylene Thweatt received notice of [the Tribe's] intention to exercise this option before October 3, 2000, we believe that [the Tribe's] June 27, 2000, notice letter - while confusing in its references to permit violations and its incorrect references to the date on which the Permit might terminate (that date being further confused by follow-up letters to both [Appellant] and the residents of Twin Palms Resort) - constitutes a valid exercise of [the Tribe's] unilateral option to cancel the Permit, effective December 31, 2000. Accordingly, we do not believe it is necessary to reach the merits of your appeal from the Agency's decision to cancel the Permit for cause, and we hereby dismiss the appeal as being moot and vacate the Agency's October 20, 2000, decision.

Regional Director's Dec. 15, 2000, Decision at 2.

Appellant appealed this decision to the Board. Upon receipt of Appellant's notice of appeal, the Board issued a pre-docketing notice in which it asked the Regional Director to transmit the administrative record. In response, the Regional Director filed a motion to dismiss this appeal and a motion to waive the requirement in 43 C.F.R. § 4.335 for submission of the record. The Board took the Regional Director's motion to dismiss under advisement and authorized him to submit a partial record, i.e., omitting the documents already submitted by Appellant. On April 3, 2001, following receipt of the record, the Board issued a notice of docketing and established a briefing schedule. Briefs were filed by Appellant and the Regional Director. 4/ The Regional Director's answer brief was accompanied by a motion to require

4/ The Tribe has not participated in this appeal although it has been fully advised of its right to do so.

Appellant to post an appeal bond. The Board denied the motion, and the Regional Director moved for reconsideration. The motion for reconsideration is still pending.

Appellant contends that none of the correspondence he received from the Tribe or the Superintendent can reasonably be construed as notice of the Tribe's intent to terminate the permit on December 31, 2000, under paragraph 5 of the permit. He contends that he first received notice of such an intent on December 21, 2000, when he received the Regional Director's decision. Further, he contends that no notice at all was given to Joylene Thweatt, the permittee of record, even though one of the grounds for termination was Appellant's failure to obtain approval of a transfer of the permit from Joylene Thweatt. Finally, Appellant argues that BIA is precluded from recognizing a purported termination of the permit by the Tribe which fails to comply with the permit's termination provisions. As relief, he asks the Board to reinstate his appeal from the Superintendent's October 20, 2000, cancellation decision.

The Regional Director argues that the Tribe's June 27, 2000, letter was effective as a notice of termination. He contends:

> While the date of termination in this letter was incorrect, and should have stated the end of the calendar year or December 31 as the termination date, the intent is clear and unmistakable. The [Tribe] was seeking to exercise its unilateral right to terminate the lease under the negotiated terms in paragraphs 5 and 16.

Regional Director's Answer Brief at 2. The Regional Director further contends that because the termination was effected by the Tribe, rather than BIA, the Board lacks jurisdiction over this matter. As he did in his December 15, 2000, decision, the Regional Director relies on Scherler v. Anadarko Area Director, supra.

Scherler concerned the cancellation of a lease by the Kiowa, Comanche, and Apache Intertribal Land Use Committee (KCAILUC). The KCAILUC cancelled the lease without BIA involvement, as it was authorized to do under a provision in the lease. The lessee attempted to appeal the KCAILUC's action to the Anadarko Area Director, who held that there was no appealable BIA decision. 5/ The Board agreed and held that it lacked jurisdiction over the matter.

5/ The Anadarko Area Director recognized, however, that his own decision was appealable and provided appeal instructions. In this case, the Regional Director failed to provide appeal instructions.

Clearly, the Regional Director's Dec. 15, 2000, letter was an appealable decision. See, e.g., Oglala Sioux Tribe v. Aberdeen Area Director, 16 IBIA 201, recon. denied, 16 IBIA 224 (1988) (A BIA letter which has the effect of denying relief to an appellant is appealable under 25 C.F.R. Part 2). Accordingly, under 25 C.F.R. § 2.7(c), the Regional Director should have included appeal instructions in his decision.

This case is clearly distinguishable from Scherler. Here, unlike in Scherler, there was indisputable BIA involvement in that the Superintendent acted to cancel the lease.

Further, in Scherler, there was no question as to the nature of the action taken by the KCAILUC. Here, although the Regional Director characterizes the Tribe's June 27, 2000, letter as expressing a "clear and unmistakable" intent to terminate the permit, the letter is far from clear as to when and by whom the Tribe intended the permit to be terminated. As the Regional Director acknowledges, the letter states an incorrect date for termination under paragraph 5 of the permit. More confusingly, the letter expresses an intent to initiate the lease cancellation procedures in 25 C.F.R. § 162.14 (2000), which ultimately would have required a cancellation decision by a BIA official.

The Tribe's actions subsequent to June 27, 2000, add to the uncertainty concerning its intent. On October 5, 2000 (five days after the September 30, 2000, termination date stated in its June 27, 2000, letter), the Tribe sent Appellant a letter stating that Appellant was in violation of several permit provisions. As indicated above, that letter said nothing about the possibility of termination or cancellation of the permit. On November 2, 2000, the Tribe sent Appellant a letter purporting to cancel the permit as of December 4, 2000, because of Appellant's failure to secure the Tribe's permission for transfer of the permit to him. The Tribe's October 5 and November 2, 2000, letters demonstrate that the Tribe did not then construe its June 27, 2000, letter as having already effected a termination of the permit.

The Board finds that the Tribe's correspondence to Appellant cannot reasonably be construed as notice of the Tribe's intent to terminate the permit on December 31, 2000, under paragraph 5 of the permit. The Board also finds that there is no evidence that the Tribe provided any notice at all to Joylene Thweatt, the permit holder of record (and thus the person to whom the Tribe was required to give notice under paragraph 5 of the permit). 6/

Accordingly, the Board holds that the Regional Director erred in concluding that the Tribe's June 27, 2000, letter terminated the permit in accordance with paragraph 5 of the permit. In light of this holding, the Regional Director's December 15, 2000, decision must be vacated.

It is apparent that the Superintendent's October 20, 2000, cancellation decision must also be vacated, although not for the reason given by the Regional Director in his decision. Rather, the Superintendent's decision must be vacated because he failed to provide notice of the decision to Joylene Thweatt, the permit holder of record.

6/ The Regional Director stated in his decision (see quoted portion above) that it was undisputed that Joylene Thweatt received notice of the Tribe's intent before Oct. 3, 2000. The basis for this statement is not clear. The record before the Board contains no evidence that notice was ever given to her, either by the Tribe or by the Superintendent.

In order to avoid any further delay, the Board will vacate the Superintendent's decision at this time. The matter will be remanded to the Superintendent, who may reinstitute cancellation proceedings under the regulations in 25 C.F.R. Part 162 (2001), if he determines that such proceedings are appropriate. In the alternative, the Tribe may elect to proceed under the permit.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's December 15, 2000, decision and the Superintendent's October 20, 2000, decision are vacated, and this matter is remanded to the Superintendent for further proceedings in accordance with the preceding paragraph. 7/

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

7/ All pending motions are denied.